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No. _____

Supreme Court
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In The

Supreme Court of the United States

October Term, 1992

JACK MORGAN, Warden,

Petitioner,

vs.

JAMES THOMAS JEFFERSON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is a criminal defendant entitled to the reversal of his conviction based upon discrimination against blacks in the selection of grand jury members over a period of years, where the number of blacks on the grand jury which actually indicted him was representative of the percentage of blacks in the population?

II. Is a criminal defendant entitled to the reversal of his conviction based upon discrimination in the selection of grand jury members when the lack of prejudice to him is demonstrated by the petit jury's finding of guilt beyond a reasonable doubt?

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OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Sixth Circuit was filed on April 29, 1992, and is cited at 962 F.2d 1185. The opinion appears as Appendix "A".

The unpublished opinion of the United States District Court for the Middle District of Tennessee was filed on May 20, 1991. The opinion appears as Appendix "B".

The published opinion of the United States District Court for the Middle District of Tennessee in the petitioner's first habeas corpus action was filed on March 30, 1985. It is reported at 607 F.Supp. 355.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 29, 1992. This petition was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. XIV, § 1:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At its May, 1968 term, the Davidson County Grand Jury returned indictments against the respondent charging him with first-degree murder of John Robert Bolte; rape of Barbara Bolte, the wife of John Robert Bolte; assault with intent to murder Barbara Bolte; and assault with intent to murder the Boltes' 18-month-old daughter.

The 13-member grand jury contained one black regular member at the beginning of the May, 1968 term.

During the term, a second black person became a temporary, and then a permanent, replacement for one other member of the grand jury. During the same term, one other black person served as a temporary replacement. On the day that the evidence was presented against respondent Jefferson, as well as on the day the grand jury returned the indictment, two of its 13 members, constituting 15.38%, were black. During the time that the third black served, 23.08% of the members were black. At the time, the population of Davidson County over 21 years of age was approximately 17.8% black.

Prior to his trial, the respondent filed a plea in abatement alleging systematic exclusion of blacks from grand and petit juries in Davidson County. The motion was denied without a hearing.

Jefferson was first tried on the rape indictment. That trial ended in a mistrial.

Jefferson's trial for the murder of Mr. Bolte occurred in early 1971. The State presented proof that Jefferson broke into the Boltes' home late one night. He struck Mr. Bolte in the back of his neck with an ax, killing him. He stabbed Mrs. Bolte in the arm with a knife with such force that the handle broke off and the blade remained in her arm. He also struck her in the head with an ax, and raped her. He struck and wounded the Boltes' 18-month-old daughter with the ax. Mrs. Bolte positively identified Jefferson after giving a very accurate description of him to investigating officers. In addition, Jefferson was in possession of a large number of buffalo nickels like those taken from the Bolte home. More importantly, Jefferson had been in possession of the Benrus watch taken from

Mr. Bolte on the night of his murder. The name "Bolte" was inscribed on the watch in two places. The letters "Jeffer" and "son" were scratched on the back case. *State v. Jefferson*, 529 S.W.2d 674 (Tenn. 1975).

On March 5, 1971, the jury returned a verdict finding Jefferson guilty of murder in the first degree as charged in the indictment, and fixed his punishment at 99 years in the state penitentiary.

The Tennessee Court of Criminal Appeals affirmed the conviction, but remanded the case to the trial court for a hearing on the alleged systematic exclusion of blacks from grand and petit juries in Davidson County. The Tennessee Supreme Court affirmed the judgment of the Court of Criminal Appeals. *State v. Jefferson*, 529 S.W.2d 674 (Tenn. 1975).

Upon remand, the trial court conducted an evidentiary hearing concerning systematic exclusion and overruled the plea in abatement. The Court of Criminal Appeals affirmed the judgment, *Jefferson v. State*, 559 S.W.2d 649 (Tenn. Crim. App. 1977), and on October 11, 1977, the Tennessee Supreme Court denied certiorari.

On April 1, 1982, the respondent filed a petition for the writ of habeas corpus in the United States District Court for the Middle District of Tennessee alleging, among other things, systematic exclusion of blacks from grand juries in Davidson County. After an evidentiary hearing, the district court granted the writ and ordered the State to reindict the respondent within 90 days or release him.

The State appealed that decision to the United States Court of Appeals for the Sixth Circuit. In an order filed June 10, 1986, that court found that Jefferson had failed to exhaust available state remedies on all issues raised in the habeas petition. Accordingly, it reversed the judgment of the district court and remanded the case with instructions to dismiss the petition without prejudice.

Jefferson next filed a petition for post-conviction relief in the Criminal Court for Davidson County asking that his conviction be set aside on the basis of racial discrimination in the selection of forepersons on Davidson County grand juries. The trial court denied the petition after an evidentiary hearing. The Tennessee Court of Criminal Appeals affirmed that decision, and the Tennessee Supreme Court denied Jefferson's application for permission to appeal.

On May 10, 1989, Jefferson filed the instant action. The district court referred the case to a magistrate. Jefferson filed a motion to reinstate and reincorporate the district court's findings of fact and conclusions of law from the prior habeas corpus case. On January 18, 1991, the magistrate filed a report and recommendation recommending, among other things, that the motion to reinstate be granted.

On May 20, 1991, the district court entered an order overruling the State's objections to the report and recommendation, reinstating the findings of fact and conclusions of law from the prior case, and conditionally granting the writ of habeas corpus. The court ordered the State to reindict Jefferson within 90 days of entry of the order or release him from custody. The judgment was

stayed pending the State's appeal to the Sixth Circuit Court of Appeals.

On April 29, 1992, the Sixth Circuit affirmed the judgment of the district court. The State filed a timely motion for a stay of the mandate, which is currently pending.

REASONS FOR GRANTING THE WRIT

As is discussed in more detail below, the decision of the Court of Appeals presents two important questions of federal law regarding the applicability of the harmless error rule to claims of discrimination in the selection of grand jury members. The first issue warrants review by this Court so that it may correct a body of wrongly decided case law which has developed in the lower courts. As to the second issue, this case presents an appropriate vehicle for re-examining and overruling a wrongly decided precedent of this Court, *Vasquez v. Hillery*, 474 U.S. 264 (1986).

First, is a prisoner entitled to the reversal of his conviction based upon past discrimination against blacks in the selection of grand jury members when blacks were not underrepresented on the grand jury which actually indicted him? This issue is one which the Court has not previously addressed. However, as will be explained below, many lower courts, including the Sixth Circuit in this case, have erroneously held that a prisoner is automatically entitled to the reversal of his conviction if blacks were underrepresented on past grand juries, even

if the grand jury which indicted him mirrored the community. The reversal of such a conviction is not required to remedy the prejudice to the petitioner. It also is not justified by its deterrent effect, where the system which resulted in underrepresentation in years preceding the respondent's indictment was abandoned shortly thereafter and has not been in use for over 20 years.

Second, is a prisoner entitled to the automatic reversal of his conviction based upon discrimination in the selection of members of the grand jury which indicted him although a constitutionally selected petit jury has found guilt beyond a reasonable doubt, or can the error be considered harmless? Although this Court in *Vasquez v. Hillery*, 474 U.S. 264 (1986), refused to adopt a harmless error analysis for such an error, *Vasquez* is inconsistent with this Court's subsequent decisions concerning the application of the harmless error rule in other contexts. The petitioner submits that *Vasquez* should be overruled in favor of a harmless error analysis.

ARGUMENT

I. THE RESPONDENT IS NOT ENTITLED TO THE REVERSAL OF HIS CONVICTION BASED UPON PAST DISCRIMINATION AGAINST BLACKS IN THE SELECTION OF GRAND JURY MEMBERS WHERE BLACKS CONSTITUTED A PERCENTAGE OF MEMBERS OF THE GRAND JURY WHICH ACTUALLY INDICTED HIM WHICH WAS FULLY REPRESENTATIVE OF THE COMMUNITY.

The proof in this case shows that blacks were not underrepresented on the grand jury which indicted the

respondent. The courts below found that the respondent was entitled to habeas corpus relief based upon proof of underrepresentation of blacks on grand juries during years prior to his indictment. The petitioner submits that the reversal of a prisoner's conviction for systematic discrimination in selection of grand jurors is not appropriate where, as in this case, the grand jury which actually indicted the prisoner was fully representative of the community.

In *Thiel v. So. Pacific Co.*, 328 U.S. 217 (1946), the Court reversed a civil judgment based upon the exclusion of working class and less-wealthy persons from the panel from which the jury was chosen. In doing so, the Court stated that it was immaterial that the jury that sat on the case was found to contain at least five members of the laboring class. *Id.* at 225. However, the Court expressly rested its reversal of the judgment on the "exercise of [its] power of supervision over the administration of justice in the federal courts." *Id.* The Court cited as authority for its action *McNabb v. United States*, 318 U.S. 332 (1943), a federal criminal case in which the Court noted that its power to reverse convictions in state courts, unlike its power to reverse convictions in federal courts, is limited to the enforcement of those "fundamental principles of liberty and justice secured by the Fourteenth Amendment." *Id.* at 340. *Thiel*, therefore, has no application on the facts of this habeas corpus case.

In *United States v. Dennis*, 183 F.2d 201, 216 (2nd Cir. 1950), *aff'd. on other grounds* 341 U.S. 494 (1951), the Court was faced with a claim of systematic exclusion of lower economic groups from jury lists. It stated as follows:

> We *assume for argument* that if a jury list – that is, the list from which separate panels are drawn – was unlawful, any separate panel based upon that list was unlawful, though taken by itself it was unexceptionable. That is to say, we will *assume* that any party to a suit, civil or criminal, is entitled to have the particular panel which tries his case, drawn at random from a list which is not unlawfully weighted, and that he may complain even though he has not shown that the imbalance has prejudiced him.

Id. at 216 (emphasis added).

Based upon the assumptions stated in the quoted language, the Court nevertheless denied relief on the basis that the defendant failed to prove his claim. The Court did not hold that the fact that a jury is fully representative does not defeat a claim of systematic exclusion of an identifiable group. It found it unnecessary to decide the issue.

Notwithstanding the limited basis of this Court's holding in *Thiel*, and the absence of a resolution of the issue in *Dennis*, those cases have been cited numerous times by the lower courts as authority for the proposition that it is irrelevant to a claim of discrimination in the selection of jury panels that the defendant's own jury was representative. *See, e.g., United States v. Donohue*, 574 F.Supp. 1269, 1278 (D. Md. 1983); *United States v. Guzman*, 337 F.Supp. 140, 142 (S.D. N.Y. 1972), *aff'd.* 468 F.2d 1245 (2nd Cir. 1972), *cert. denied* 410 U.S. 937 (1973); *United States v. Cohen*, 275 F.Supp. 724, 739 (D. Md. 1967), *aff'd. on other grounds sub nom. United States v. DiTomnaso*, 405 F.2d 385 (4th Cir. 1968), *cert. denied* 394 U.S. 934 (1969). The petitioner submits that the cases which have

expanded this Court's holding in *Thiel* and reversed convictions based upon discrimination in the selection of members of past grand juries, where the grand jury which indicted the defendant contained a percentage of blacks approximating that of the population, are erroneous. This Court should grant certiorari in this case to address this issue.

II. *VASQUEZ* SHOULD BE OVERRULED IN FAVOR OF A HARMLESS ERROR ANALYSIS.

With very few exceptions, a conviction will not be reversed for an error unless the error prejudiced the defendant. The harmless error rule has been applied to constitutional, as well as nonconstitutional errors. *See Chapman v. California*, 386 U.S. 18 (1967). Recently, the rule has also been applied to errors occurring in the indictment process. *See Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988); *United States v. Mechanik*, 475 U.S. 66 (1986).

One of the few exceptions to the harmless error rule which has been recognized by this Court is that discrimination in the selection of grand jury members automatically requires the reversal of any conviction without any inquiry into whether the discrimination affected the verdict. *Vasquez, supra*. The Court has explained the result in *Vasquez* by characterizing it and other decisions involving exceptions to the harmless error rule as decisions involving situations "in which the structural protections of the grand jury have been so comprised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Bank of Nova Scotia v. United States*, 487

U.S. at 256-257. The Court stated that "any inquiry into harmless error would have required unguided speculation." *Id.* at 257.

The petitioner submits that the impact upon a defendant of discrimination in the selection of grand jury members may be easily assessed, like the impact of other errors in the indictment process. It is, therefore, an error which is more appropriately placed in the general category of errors which are subject to harmless error analysis. After a defendant has been found guilty beyond a reasonable doubt by a petit jury, no speculation is required to reach the conclusion that the underrepresentation of a segment of the population on a grand jury did not affect the grand jury's finding of probable cause.

In *Vasquez*, the majority rejected the argument that the confirmation of a grand jury's finding of probable cause by a conviction based upon proof beyond a reasonable doubt establishes that the grand jury discrimination did not prejudice the defendant. The majority reasoned that the discrimination could have affected "the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." 474 U.S. at 263. Thus, the majority was concerned with a court's ability to determine whether a constitutionally selected grand jury would have refused to indict despite the existence of probable cause. That concern is unwarranted for two reasons.

First, the decision of a grand jury to refuse to indict in a case presented to it, or its action in indicting on fewer or lesser charges than warranted by the evidence, is not an irreversible one. Nothing in Tennessee law precludes a

prosecutor from presenting the case to a subsequent grand jury and obtaining an indictment on all charges for which probable cause exists. *See Zachary v. State*, 66 Tenn. 1 (1872); Tenn. R. Crim. P. 11.

Second, a petit jury may refuse to convict a defendant despite the existence of proof beyond a reasonable doubt, just as a grand jury may refuse to indict a defendant despite the existence of probable cause. A petit jury's ability to engage in jury nullification, however, has never been held to be a basis for refusing to apply a harmless error rule to constitutional violations occurring at trial. A grand jury's opportunity to engage in jury nullification is even less justification for an automatic reversal for errors occurring in the indictment process. When a valid petit jury has returned a verdict finding a defendant guilty as charged in an indictment and declined to engage in jury nullification, the conviction confirms not only the grand jury's probable cause determination, but also its failure to exercise its option to refuse to indict even in the presence of probable cause.

This Court has applied the harmless error rule to other errors occurring in the indictment process. In *United States v. Mechanik*, 475 U.S. 66 (1986), the Court held that a violation of Rule 6(d) of the Federal Rules of Criminal Procedure forbidding the presence of more than one witness at a time before the grand jury was harmless in light of the verdict by the petit jury finding the defendant guilty beyond a reasonable doubt. In *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), the Court held that an indictment may not be dismissed for prosecutorial misconduct which does not prejudice the defendant. It is

no more difficult to assess the prejudicial impact of discrimination in the selection of grand jury members than to assess the prejudicial impact of other errors in the indictment process. The harmless error rule is appropriate.

An automatic reversal rule also is not justified on the basis of the need for deterrence of discrimination in selection of grand jurors. The proof in this case shows that the grand jury selection system which the respondent attacks was discontinued in Davidson County approximately in 1971, shortly after the respondent's indictment. The reversal of the respondent's conviction 24 years after the petitioner's indictment would certainly have no effect on grand jury selection procedures today.

Based upon the foregoing, the petitioner submits that this Court should grant certiorari in this case and reverse its decision in *Vasquez*.

CONCLUSION

For the reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
PURSUANT TO SIXTH CIRCUIT RULE 24

No. 91-5764

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES THOMAS JEFFERSON, *Petitioner-Appellee,* v. JACK MORGAN, Warden, *Respondent-Appellant.*	)))))))	ON APPEAL from the United States District Court for the Middle District of Tennessee

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Decided and Filed April 29, 1992

Before: KEITH and MARTIN, Circuit Judges; and BELL, District Judge.*

BOYCE F. MARTIN, JR., Circuit Judge. Jack Morgan, who is warden of the Tennessee State Penitentiary, appeals the judgment of the district court granting James Thomas Jefferson a writ of habeas corpus under 28 U.S.C. § 2254. For the following reasons, we affirm.

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*The Honorable Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

On July 23, 1968, a Davidson County, Tennessee, grand jury indicted Jefferson, a black citizen, for first-degree murder, rape, and assault with intent to commit murder. The grand jury that indicted Jefferson contained two black members out of 13 total members. Prior to trial, Jefferson filed a plea in abatement alleging a systematic exclusion of blacks from grand and petit juries in Davidson County. Without the benefit of a hearing, the trial court denied Jefferson's plea after ruling there was no systematic exclusion of blacks from juries.

Jefferson's first trial ended when the trial court declared a mistrial because the petit jury, which was composed of seven whites and five blacks, was unable to reach a unanimous verdict. At his second trial, Jefferson again alleged that the county had systematically excluded blacks from grand and petit juries. The trial court overruled Jefferson's objection, and the jury, which was composed of ten whites and two blacks, convicted Jefferson. He was sentenced to 99 years in prison.

On appeal, the Tennessee Court of Criminal Appeals remanded the case to the trial court with instructions to conduct an evidentiary hearing on the issue of the systematic exclusion of blacks from juries. The Tennessee Supreme Court affirmed the remand order. On remand, the trial court limited Jefferson's proof of his claim to the composition of the particular grand jury that indicted him and to the particular petit jury that convicted him. The trial court subsequently held there was no systematic exclusion of blacks from either jury. In 1977, the Tennessee Court of Criminal Appeals affirmed the trial court's decision, and the Tennessee Supreme Court denied certiorari.

On April 1, 1982, Jefferson filed a petition for a writ of habeas corpus in federal district court. Jefferson requested the district court to quash his indictment and to vacate his conviction because Davidson County had systematically excluded blacks from grand and petit juries in violation of the Equal Protection Clause and the Sixth Amendment's fair-cross-section requirement. At an evidentiary hearing, Jefferson presented evidence that in the decade prior to his indictment, from 1958 through 1968, two criminal court judges selected grand jurors under a "key man" system. Under the "key man" system, the judges personally selected prospective grand jurors from the community at large. During this time period, the judges selected 33 grand juries, with each grand jury being composed of 13 members including one foreperson. Of the 33 grand juries, Jefferson established the racial composition of 26 grand juries. The proof showed that no more than 20 blacks served in the 338 positions available on the 26 grand juries. Consequently, the grand juries were, at most, 5.9% black. During this same time period, the population of Davidson County was approximately 18.5% black. The district court concluded the state had violated equal protection guarantees by systematically excluding blacks from grand juries including excluding blacks from the position of grand jury foreperson. The court granted Jefferson a writ of habeas corpus and ordered the state to re-indict Jefferson within 90 days or release him from custody.

On appeal, this court held that under *Rose v. Lundy*, 455 U.S. 509 (1982), Jefferson had failed to exhaust available state remedies on the grand jury foreperson issue. We reversed the district court's judgment and ordered the

district court to dismiss the petition without prejudice. On August 26, 1986, Jefferson filed a petition for post-conviction relief in the Criminal Court for Davidson County requesting the court to vacate his murder conviction because of racial discrimination in the selection of grand jury forepersons. After a hearing, the court rejected Jefferson's claim and dismissed his petition. The Tennessee Court of Criminal Appeals affirmed the trial court's judgment, and the Tennessee Supreme Court denied review.

On May 10, 1989, Jefferson filed this current action, seeking a writ of habeas corpus. Jefferson alleged that Davidson County had systematically excluded blacks from grand juries and also from the position of grand jury foreperson in violation of the Equal Protection Clause. Pursuant to 28 U.S.C. § 636(b)(1)(B), the district court directed a magistrate judge to conduct a hearing and submit a report. In his report, the magistrate recommended that under the "law of the case" doctrine the court should reinstate its prior decision finding that Davidson County had systematically excluded blacks from grand juries. On May 20, 1991, the district court adopted the magistrate judge's Report and Recommendation, reinstated the court's earlier findings of fact and conclusions of law, and granted Jefferson a writ of habeas corpus. The court again ordered the state to re-indict Jefferson within 90 days or release him from custody. The district court, however, stayed its order pending appeal.

On appeal, Morgan contends that the district court's decision is erroneous on three possible grounds. First, Morgan asserts that Jefferson failed to establish a prima facie case of racial discrimination in the selection of

grand juries. Second, Morgan argues that he rebutted any prima facie case that Jefferson established. Finally, Morgan contends that even if Jefferson established a violation of equal protection, this court should not reverse Jefferson's conviction and dismiss the indictment.

Although there is no constitutional right to be indicted by a state grand jury, if a state chooses to use a grand jury, it must select members of the grand jury without discrimination based on race or color. *Aldridge v. Marshall*, 765 F.2d 63, 68 (6th Cir. 1985), *cert. denied sub nom. Aldridge v. Morris*, 474 U.S. 1062 (1986). The Supreme Court has long held that racial discrimination in the selection of a grand jury violates a defendant's equal protection rights. *See e.g., Swain v. Alabama*, 380 U.S. 202 (1965); *Cassell v. Texas*, 339 U.S. 282 (1950); *Strauder v. West Virginia*, 100 U.S. 303 (1879). In *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979), the Supreme Court summarized the harm resulting from excluding potential grand jurors because of their race:

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. As this Court repeatedly has emphasized, such discrimination 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.' *Smith v. Texas*, 311

> U.S. 128, 130 (1940) (footnote omitted). The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole.

In order to prove discrimination in the selection of grand jurors, a petitioner may show that the procedure employed by the state resulted in a substantial underrepresentation of his race or of the identifiable group to which he belongs. *Castaneda v. Partida*, 430 U.S. 482, 494 (1977). Specifically, to establish a prima facie case of discrimination, a petitioner must satisfy a three-part test. First, he must establish that the group excluded from the grand jury is one that is a recognizable, distinct class capable of being singled out for different treatment under the laws. *Id.* Second, he must establish that the selection procedure used by the state to select grand juries is susceptible to abuse or is not racially neutral. *Id.* Finally, he must establish the degree of underrepresentation occurring over a significant period of time by comparing the proportion of the excluded group in the total population to the proportion serving as grand jurors. *Id.* Courts refer to this final part of the three-part test as the "rule of exclusion." The rationale behind the "rule of exclusion" is that if a disparity is sufficiently large over a significant period of time, then it is unlikely that the disparity is due solely to chance or to accident, and in the absence of evidence to the contrary, a court should conclude that racial or other class-related factors entered into the selection process. *Id.* at n. 14. Once the petitioner has established a prima facie case, the burden shifts to the state to rebut the inference of intentional discrimination. *Id.* at 495.

In this case, Jefferson has established a prima facie case of racial discrimination. First, there is no question that Jefferson, as a black citizen, is a member of the distinct class that is capable of being singled out for different treatment under the laws. *See Rose*, 443 U.S. at 565. Second, the "key man" system, which was the process used to select grand jurors during the time period in which Jefferson was indicted, was susceptible to abuse. *See id.* at 566; *Castaneda*, 430 U.S. at 497.

Finally Jefferson has satisfied the "rule of exclusion." During the relevant time period, the state empanelled 33 grand juries. Jefferson and the state could not accurately establish the racial composition of several grand juries; however, the evidence demonstrated that on 26 grand juries no more than 20 blacks served in the 338 grand jury positions available. Thus, no more than 5.9% of the grand jurors were black. During the same period, the population of Davidson County was composed of approximately 18.5% blacks.

Morgan's assertions notwithstanding, comparing straight racial percentages is of little value to this court. In *Moultrie v. Martin*, 690 F.2d 1078 (4th Cir. 1982), the Fourth Circuit nicely stated the rationale for not merely comparing straight racial percentages:

> When a litigant seeks to prove his point exclusively through the use of statistics, he is borrowing from another discipline, mathematics, and applying these principles to the law. In borrowing from another discipline, a litigant cannot be selective in which principles are applied. He must employ a standard mathematical analysis. Any other requirement defies logic to the point

> of being unjust. Statisticians do not simply look at two statistics, such as the actual and expected percentage of blacks on a grand jury, and make a subjective conclusion that the statistics are significantly different.

Id. at 1082. We do recognize that the Court in *Castaneda* compared the percentage of Mexican-Americans with the percentage of Mexican-Americans in the relevant population. *See Castaneda,* 430 U.S. at 495-96. In an extensive footnote, however, the Court made reference to using standard deviation analysis as a means of predicting the significance of racial disparities. *See id.* at n.17. *See also Ford v. Seabold,* 841 F.2d 677, 684 n.5 (6th Cir. 1988) (acknowledging the use of statistical decision theory in the context of equal protection claims, but rejecting its use in the context of a fair-cross-section claim). Standard deviation is a measure of the extent to which an observed result is likely to vary from an expected result. The larger the number of standard deviations an observed result is from an expected result, the lower the probability that the observed result is random. More specifically, in the context of racial discrimination claims, the larger the number of standard deviations, the more likely the observed result is the product of discrimination rather than chance.

Before applying standard deviation analysis, we need to determine how may blacks one would have expected Davidson County to select out of the 338 grand jury positions available. The formula for determining an expected result is: n x p, where "n" is the sample size (here, the total number of grand jurors selected by the county, which is 338) and "p" is the proportion of items possessing the characteristic that is being investigated

(here, the proportion of blacks in Davidson County, which is 0.185). Applying the formula to the statistics at hand, we have determined that in the 26 grand juries empaneled by Davidson County, one would have expected the county to have selected approximately 63 black grand jurors. They, of course selected 20 black grand jurors.

The formula for determining standard deviation is: $\sqrt{n} \times p \times (1-p)$. See W. Mendenhall, *Introduction to Probability and Statistics* 180 (6th ed. 1983). Using this formula, the standard deviation of the sample is 7.1 blacks. This means that a statistician would expect that if Davidson County had randomly selected the 338 grand jurors it would have selected approximately 63 +/- 7 blacks. The final step in our analysis is determining by how much the expected result (63 blacks) and the observed result (20 blacks) differ in terms of standard deviations. this difference is called the "z-score" or standard score, and its formula is: (observed result-expected result)/(standard deviation). See *id.* at 211. In this case, the data yields a difference of approximately -6 standard deviations.

We decline to decide at what point a court should conclude that the difference between the expected result and the observed result is significant enough to establish a prima facie case of discrimination. *See Castaneda*, 430 U.S. at 496 n.17. ("As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.") In this case, however, we do hold that -6 standard deviations is

sufficient to establish a prima facie case of racial discrimination. Given the racial composition of Davidson County, the odds that the county would have *randomly* selected only 20 blacks for the 338 grand jury positions are approximately 1,000,000,000 to 1. *See CRC Standard Probability and Statistics Tables and Formulae* 124 (William Breyer ed., 1991) Thus, the hypothesis that Davidson County drew grand jurors without regard to race is suspect. In sum, because Jefferson has satisfied all three parts of the *Castaneda* test, we hold that he has established a prima facie violation of the Equal Protection Clause.

Morgan asserts that Jefferson cannot establish a prima facie case because the particular grand jury that indicted Jefferson was 15.4% black and thus almost perfectly reflected the proportion of blacks in the eligible pool of grand jurors (18.5%). Morgan's assertion, however, is without merit. In *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972) (citation omitted), the Supreme Court stated:

> Although a defendant has no right to demand that members of his race be included on the grand jury that indicts him, he is entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice.

In other words, the Equal Protection Clause *does not* guarantee a black defendant seven, five, or even one black on any grand jury that indicts him. The clause *does not* guarantee a black defendant a grand jury that accurately reflects the racial composition of the community. The Equal Protection Clause *does* guarantee, however,

that a state will not exclude *any* grand juror simply because he or she is black. Thus, the fact that the grand jury that indicted Jefferson contained two blacks does not defeat his equal protection claim.

Granted, as Morgan asserts, a petitioner may prove discrimination in ways other than by evidence of long-term underrepresentation. In *Batson v. Kentucky*, 476 U.S. 79, 95 (1986), the Supreme Court noted that absent evidence of systematic, long-term underrepresentation, a petitioner could establish a prima-facie case of an equal protection violation by demonstrating that (1) members of his race were substantially underrepresented on the venire from which his particular jury was drawn; and (2) the venire was selected under a practice providing an opportunity for discrimination. We, however, do not see *Batson* as standing for the proposition that Jefferson is precluded from proving an equal protection violation simply because he had the "right number" of blacks on his grand jury; there is no "right number" of blacks on a grand jury. The long line of Supreme Court cases including *Castaneda* and *Batson* stand for the proposition that a petitioner can establish a prima facie case of racial discrimination in the selection of jurors by demonstrating *either* (1) underrepresentation of the petitioner's race on the particular grand jury that indicted the petitioner and a selection system that is subject to abuse; *or* (2) underrepresentation of the petitioner's race on numerous grand juries over a significant period of time. Either showing produces an inference that the state discriminated in selecting a petitioner's particular grand jury.

Next, Morgan argues that he rebutted any prima facie case that Jefferson established. The rebuttal evidence introduced by the state consisted of the testimony of Judge John Draper and Judge Raymond Leathers, the two criminal court judges who were primarily responsible for selecting grand jurors during the relevant time period. The judges denied that they excluded jurors on the basis of race. They testified that in order to recruit grand jurors they depended on first-hand knowledge and on recommendations from friends and civic groups. Both judges used supposedly objective guidelines to select grand jurors, including citizenship activities, maturity, work experience, and standing in the community. We believe the judges' testimony constitutes no more than affirmations of good faith, which are insufficient to rebut the prima facie case established by Jefferson. *See Alexander,* 405 U.S. at 632.

Finally, Morgan argues that even if Jefferson established an equal protection violation, the appropriate remedy is not for us to reverse Jefferson's conviction and dismiss the indictment. Morgan argues, in essence, that even if the grand jury that indicted Jefferson was selected in an unconstitutional manner, the violation was harmless in light of the fact that a trial jury has found Jefferson guilty beyond a reasonable doubt. In other words, Morgan appears to argue that Jefferson's subsequent conviction purged any taint attributable to an unconstitutional grand jury selection process. We, however, reject Morgan's argument. In rejecting an identical argument, the Supreme Court stated:

> Nor are we persuaded that discrimination in the grand jury has no effect on the fairness of the

> criminal trials that result from the grand jury's actions. The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense – all on the basis of the same facts. . . . Thus even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or the very existence of the proceedings to come.

Vasquez v. Hillery, 474 U.S. 254, 263 (1986). *See also Rose*, 443 U.S. at 551 ("[W]here sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, this court uniformly has required that the conviction be set aside and the indictment returned by the unconstitutionally constituted grand jury be quashed.").

Morgan's reliance on *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), and *United States v. Mechanik*, 475 U.S. 66 (1986), is misplaced. *Bank of Nova Scotia*, 487 U.S. at 252, involved the dismissal of an indictment based on prosecutorial misconduct. The Supreme Court applied harmless-error analysis and held that the district court could not dismiss the indictment for errors in the grand jury proceedings unless the errors prejudiced the defendant. *Id.* at 254. The court cautioned, however, that cases like *Bank of Nova Scotia* were distinguishable from cases

like *Vasquez* because the latter cases were "ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Bank of Nova Scotia*, 487 U.S. at 257. In *Mechanik*, the Fourth Circuit had reversed the defendants' convictions because two government witnesses had testified in tandem in front of the grand jury that indicted the defendants. 475 U.S. at 67. The Supreme Court reversed the Fourth Circuit because "the petit jury's verdict of guilty beyond a reasonable doubt demonstrat[ed] a fortiori that there was probable cause to charge the defendants with the offenses for which they were convicted." *Id.* The Court, however, did not overrule *Vasquez;* it simply distinguished the case. *See id.* at 70 n.1. Despite the Supreme Court's holdings in *Bank of Nova Scotia* and *Mechanik, Vasquez* remains good law.

In summary, we hold that Jefferson has established a prima facie case of an equal protection violation, and the state has failed to rebut the prima facie case. We therefore affirm the judgment of the district court and direct the State of Tennessee to re-indict Jefferson within 90 days or release him from custody.

APPENDIX B

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JAMES THOMAS JEFFERSON	)	DOCKET NO.
VS.	)	3:89-0382
	)	
JACK MORGAN	)	

ORDER

The Court is in receipt of the Report and Recommendation of the Magistrate, and the respondent's objections thereto. The Court finds the respondent's objections to be without merit, and therefore ADOPTS the Report and Recommendation of the Magistrate. Accordingly, the Court's earlier findings of fact and conclusions of law are REINSTATED, and the petition for a writ of habeas corpus is GRANTED. The state of Tennessee is ORDERED to reindict the petitioner within ninety days of entry of this order, or to release him from custody.

Entered this the 20th day of May, 1991.

/s/ John T. Nixon
UNITED STATES
DISTRICT JUDGE

SUPREME COURT, U.S.
FILED
AUG 24 1992
OFFICE OF THE CLERK

No. 92-193

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

JACK MORGAN, Warden,

Petitioner,

vs.

JAMES THOMAS JEFFERSON,

Respondent.

Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When there is clear evidence of discrimination against African Americans in the selection of grand jury members for a period of over ten years, does the coincidence that the racial makeup of the grand jury that indicted the defendant approximates the racial makeup of the community obviate the inherent prejudice of a discriminatory grand juror selection process?

2. Should the Court overrule the longstanding precedent that discriminatory selection of the grand jury venire is not subject to harmless error analysis?

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit and of the United States District Court for the Middle District of Tennessee are properly cited in the Petition for Writ of Certiorari filed on behalf of Jack Morgan and are contained in the state's Petition.

For a complete understanding of the Opinion of the District Court it is necessary to include the Report and Recommendation of the Magistrate which was excluded from the state's Petition and is attached.

STATEMENT OF THE CASE

Respondent, James Thomas Jefferson, was indicted in 1968 by a Davidson County, Tennessee grand jury for first degree murder, rape and two counts of assault with intent to commit murder. These offenses were tried separately. See, State v. Jefferson, 529 S.W.2d 674, 677 (Tenn. 1975). Jefferson was tried first for the rape and the jury was unable to reach a verdict. Jefferson was then tried on the charge of murder and received a sentence of 99 years in the state penitentiary. 529 S.W.2d at 678. Prior to trial, Jefferson filed a plea in abatement challenging the racial compositions of both the grand jury and the petit jury venires. 529 S.W.2d at 678. The trial court denied that there was a

systematic exclusion of blacks from the grand and petit juries in Davidson County. 529 S.W.2d at 680. This ruling of the trial court was reached without the benefit of a hearing. 529 S.W.2d at 680.

On appeal the issues of systematic exclusion of black citizens from the grand and petit juries were remanded to the trial court to determine whether there was a systematic exclusion of African-Americans from those bodies. 529 S.W.2d at 680.

When the trial court addressed the issue on remand, it limited proof of the composition of the particular grand jury which indicted Jefferson and the petit jury which convicted him. The trial court, basing its finding on focusing on the May 1968 grand jury and 1971 petit jury, held that there was no systematic exclusion of blacks from the grand jury or petit jury. Jefferson v. State, 559 S.W.2d 649, 651, 652 (Tenn. Cr. App. 1977). The Court of Criminal Appeals affirmed the holding of the trial court. 559 S.W.2d at 652.

Jefferson next filed a pro se habeas corpus petition in the United States District Court for the Middle District of Tennessee pursuant to 28 U.S.C. § 2254. Jefferson v. Dutton, 607 F.Supp. 355 (M.D. Tenn. 1985). Counsel was appointed and filed a response to the state's motion for summary judgment that included a challenge to the systematic exclusion of blacks as foremen of the Davidson County grand jury based upon this Court's holding in Rose v. Mitchell, 443 U.S. 545 (1979), which had been decided after the Jefferson's Plea in Abatement but was encompassed within his

general challenge to the composition of the grand jury.

After a lengthy evidentiary hearing the district court ruled that there had been a systematic exclusion of blacks as foremen of the grand jury based upon a ten year history wherein no blacks were appointed foreman. 607 F.Supp. at 358 - 360). The district court further held that the method of selecting the grand jury foreman had been encompassed within Jefferson's original claims and that state remedies had been exhausted. Jefferson v. Dutton, 607 F.Supp. at 357, n. 4. The district court ordered Jefferson released or retried within 90 days. The state appealed to the Sixth Circuit, which reversed the district court, finding under Rose v. Lundy, 455 U.S. 509 (1982), that the issue of systematic exclusion in the selection of the grand jury foreman had not been exhausted. Jefferson v. Dutton, No. 85-5335 (6th Cir. June 10, 1986).

On August 26, 1986, Jefferson filed his petition for post conviction relief in the state trial court challenging the grand jury foreman issue. The state trial court ruled that the Supreme Court's holding in Rose v. Mitchell, supra, was in error because the foreman of the grand jury in Tennessee had no enhanced powers. Therefore, any racial discrimination engendered in that process was to be treated as discrimination in the selection of the entire grand jury.[1] State v. Jefferson, 769 S.W.2d 875 (Tenn. Cr. App.

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[1] The state, after raising the exhaustion issue in the United States District Court through a motion to dismiss (State v. Jefferson, 769 S.W.2d at 876), apparently abandoned that position once the case was again before the state courts, and argued that the grand jury foreman issue was not a separate issue after all.

1988). The trial court then considered the question of systematic exclusion of blacks in the entire grand jury selection process and held that it was bound by the previous findings of the Court of Criminal Appeals in Jefferson v. State, 559 S.W.2d 649. On December 28, 1988, the Tennessee Court of Criminal Appeals concluded that the holding in Rose v. Mitchell did not create an independent claim under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because the Supreme Court had misstated the powers of the office. 769 S.W.2d at 877. The majority opinion went on to conclude that the prior finding that there had been no discrimination in the selection process rendered by the Court of Criminal Appeals in Jefferson v. State, 559 S.W.2d 649, was correct. 769 S.W.2d at 878.

One judge dissented pointing out the significance, for equal protection analysis, of the Davidson County procedure for appointing grand jury foremen was that they were appointed separately from the other grand jurors. Therefore, if the selection process were racially biased it would impermissibly effect the makeup of the grand jury notwithstanding the powers or lack of powers of office of foreman. 769 S.W.2d at 878-880 (Wade dissenting).

Permission to appeal to the Tennessee Supreme Court was denied on April 3, 1989. State v. Jefferson, 769 S.W.2d at 875.

On May 19, 1989, Jefferson filed his second petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United

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769 S.W.2d at 876, 877.

States District Court. The matter was then referred to the magistrate who reinstated the prior opinion of the district court as the law of the case, and concluded that the district court's former opinion was not premised on the theory that the foreperson played a distinct role, and that the district court's view of the rule of the foreperson was similar to that articulated by the state courts. (Appendix at A-11).

On May 20, 1991, the district court adopted the Report and Recommendation of the magistrate and ordered the state to reindict Jefferson within 90 days or release him from custody. (Appendix B to State's Petition). Subsequently, this order was stayed and the state filed notice of appeal to this court.

The salient facts in this case were set out in the Report and Recommendation of the magistrate which was adopted by the district court. The magistrate recommended that the prior findings of facts and conclusions reported in Jefferson v. Dutton, 607 F.Supp. 355 (M.D. Tenn. 1985), be reinstated under the doctrine of the "law of the case." (Appendix at A-2).

In the decade prior to Jefferson's indictment (1958-1968), there had been thirty-three grand juries selected by the criminal court judges of Davidson County. Seventeen of these thirty-three grand juries had only one black member, seven had no blacks, and the number of blacks on eight of the grand juries was unknown. Two blacks participated in the grand jury that indicted Jefferson. The court below found that "all twenty-five of the grand juries, for which data is available, had a percentage of blacks that was

significantly less than the percentage of the population of blacks in Davidson County. (Appendix at A-4).

During the period in question, the Davidson County grand juries were selected under a key-man system, primarily by the Honorable Raymond H. Leathers, who served as Criminal Court Judge from 1958 throughout the relevant period, and the Honorable John L. Draper, who served as the Judge of Division II of the Davidson County Criminal Court beginning in October 1960. Judges Draper and Leathers testified that they selected members of the grand jury, and in particular the grand jury forepersons, on characteristics that included "citizenship activities, maturity, work experience, standing in the community, and general qualities of good citizenship." They further testified that they depended on first-hand knowledge and referrals from friends and civic groups as the basis for recruiting grand jurors. (Appendix at A-4, A-5). Utilizing this criteria and the basis of evidence available of twenty-six grand juries selected from 1958 through 1968, all twenty-six foremen were white. Fourteen of the two hundred and fifty-two grand jurors were black. In addition, there was evidence of five additional grand juries and seven additional foremen indicating that all thirty-three grand jury foremen during the period were white and on twenty-six grand juries there were a total of three hundred and twelve non-foreman positions of which "no more than twenty (6.45%) were black." (Appendix at A-4, A-5). In addition, the proof showed that the grand jury that actually indicted Jefferson included two black members.

In 1971, three years after the indictment in this matter, the procedure was "changed to a system whereby both grand jurors and petit jurors were selected by computerized lists." (Appendix at A-4).

During this relevant period of time census figures showed that the black population of Davidson County was approximately nineteen percent. (Appendix at A-4). Therefore, all twenty-five grand juries for which a racial breakdown exists had a significantly lower proportion of blacks than did the population of the county. (Appendix at A-4).

SUMMARY OF ARGUMENT

In the instant matter, respondent, James T. Jefferson, demonstrated that the grand jury selection process excluded African Americans. This type of discrimination has been severely criticized by this Court since its decision in Strauder v. West Virginia, in 1880. It is no less serious today and its presence requires reversal of the conviction.

Vasquez v. Hillary continues to be good law and the harmless error analysis is inappropriate to constitutional violations that strike at the fundamental nature of the criminal justice system and of our society as a whole.

ARGUMENT

I. UPON A SHOWING OF DISCRIMINATORY SELECTION OF THE GRAND JURY VENIRE, A CRIMINAL DEFENDANT IS ENTITLED TO THE REVERSAL OF HIS CONVICTION AND DISMISSAL OF THE INDICTMENT.

The problem of exclusion of blacks and other well-defined groups from proper representation on state petit and grand juries has long been recognized in the United States. The Supreme Court made the eradication of such a system a priority over 100 years ago in the landmark decision of Strauder v. West Virginia, 100 U.S. 303 (1880). The Court stated at that time that the ramifications of such a system are repugnant to our notion of justice as it denies and excludes potential jurors "the privilege of participating equally. . . in the administration of justice." 100 U.S. at 308. As noted by the court below, in Rose v. Mitchell this Court summarized the harm resulting from intentional discrimination in the jury selection process as follows:

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from the grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. As this Court repeatedly has emphasized, such discrimination "not only violates our Constitution and the laws created under it, but is at war with our basic concepts of a democratic society and a representative government." Smith v. Texas, 311 U.S. 128, 130 (1940) (footnote omitted). The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. " The injury is not limited to the defendant -- there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideals reflected in the processes of our courts." Ballard v. United States, 229 U.S. 187, 195, 91 L.Ed.2d 181, 67 S.Ct. 261 (1946).

439 U.S. at 555-556. The importance of this issue not only to the defendant but to the system of justice was reiterated in Powers v.

Ohio, in which the Court reiterated "the broader constitutional imperative of race neutrality in jury selection and gave standing to criminal defendants to raise the interest of the excluded juror. ___ U.S. ___, 111 S.Ct. 1364, 1366, 1373 (1991).

Castaneda v. Partida, 430 U.S. 482, 51 L.Ed.2d 498, 97 S.Ct. 1272 (1977) sets forth the standard for determining whether a defendant has made a prima facie showing of discrimination in the selection of a state grand jury in violation of the equal protection clause of the Fourteenth Amendment. Under the rules set forth in Castaneda the petitioner is required to show that "the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." 430 U.S. at 494. First the individual must show that he is an identifiable member of a group that is a "recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." 430 U.S. at 494. The next step under Castaneda is to prove a degree of underrepresentation over a significant period of time by "comparing the proportion of the group in the total population to the proportion called to serve as grand jurors over a significant period of time." 430 U.S. at 494. Once this showing is made, the petitioner need only show that the selection procedure employed "is susceptible of abuse or is not racially neutral" in order to support a presumption of discrimination. Id. After this showing is made, the burden shifts to the state to present proof to rebut the petitioner's case. 430 U.S. at 495.

In the instant case, as held by the district court and affirmed by the court of appeals, there can be no question that Jefferson has established a prima facie case. The district court found that Jefferson was a black citizen, and with regard to the first prong of the Castaneda test, "blacks are clearly a suspect category for purposes of equal protection analysis." (Appendix at A-3, A-6; Jefferson v. Dutton, 607 F.Supp. 355, 357, 358 (M.D. Tenn. 1985)). With regard to the "rule of exclusion" Jefferson produced evidence concerning thirty-three (33) grand juries empaneled over the relevant period. Of these thirty-three grand juries surveyed during the period, seventeen had only one black member, seven had no blacks and the number of blacks on the additional eight was unknown. With regard to the grand jury foremen, who were separately selected, not a single of the thirty-three foremen was black nor a member of any other minority group. However, in considering twenty-six juries for which there were statistics during the period, only fourteen of two hundred and fifty-two jurors were black. Thus, approximately 6.45% of the grand jurors were black at a time when 19% of the population of Davidson County was black. (Appendix at A-4, A-5).

Moreover, not only has Jefferson established the requisite underrepresentation under Castaneda, his position is further supported in this matter in that the key-man system which was utilized in Davidson County at the time has been repeatedly held to be susceptible to abuse. Rose v. Mitchell, 443 U.S. at 566; see also, Castaneda v. Partida, 430 U.S. at 497 (Texas' key-man system

is susceptible to abuse). As noted by the district court in its earlier opinion, the appointing judges under the Davidson County key-man system were aware of the race of the grand jurors they appointed. 607 F.Supp. at 358.

The state does not challenge the finding that Jefferson proved the discriminatory selection of the grand jury during the relevant time frame. Rather the state argues that the equal protection violation is cured by the accidental coincidence that, of all the many grand juries over a more than ten year period, the one that indicted Jefferson included two African Americans, which constituted the requisite proportional representation from the defendant's racial group. The state suggests the ten years prior to Jefferson's indictment as well as the three years after Jefferson's indictment which amply demonstrate the absolute underrepresentation of blacks on the grand jury, not to mention the fact that there were no black grand jury foremen should be ignored. The state suggests that because the percentage of blacks on this one isolated grand jury approximated the proportion in the community that Jefferson cannot challenge the venire. (Petition for Writ of Certiorari at 7-10). This logic flies in the face of all the precedent on this issue.

This Court has repeatedly reminded us of the gravity upon which it views the systematic exclusion of African-Americans from the grand and petit juries which the Court first announced in Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880). In Norris v. Alabama, 294 U.S. 587, 589, 55 S.Ct. 579, 79 L.Ed. 1074

(1934), the Court stated:

> There is no controversy as to the constitutional principle involved. That principle, long since declared, was not challenged, but was expressly recognized, by the Supreme Court of the State. Summing up precisely the effect of earlier decisions, this Court thus stated the principle in Carter v. Texas [citation omitted] in relation to exclusion from service on grand juries: "whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in a criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. [citations omitted]

As observed by the Norris Court, this statement has been often repeated. Id. The Court again emphasized this position in Vasquez

> v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), and further stated:
> We reaffirmed our conviction that discrimination on the basis of race in the selection of grand jurors "strikes at the fundamental values of our judicial system and our society as a whole," and that the criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded.

474 U.S. at 262 (citing Rose v. Mitchell, 443 U.S. at 556, 99 S.Ct. at 3000). The courts have made it very clear that the right to be indicted and tried by a grand and petit jury free from intentional discrimination is neither subject the limitations of harmless error nor to the particular make-up of the jury involved in an individual's case.

This Court has recently cited Vasquez in reminding us of the importance of precedent. The Court stated in Hilton v. South Carolina Railways Commission, "the doctrine of stare decisis is of

fundamental importance to the rule of law." _____U.S._____, 112 S.Ct. 560, 563 (1991). The Court continued, "Adherence to precedent promotes stability, predictability, and respect for judicial authority." Id. at 564 (quoting Vasquez, 474 U.S. at 265 - 266).

II. THERE IS NO REASON TO OVERRULE THE LONGSTANDING PRECEDENT THAT SYSTEMATIC EXCLUSION OF A RACIAL GROUP FROM THE GRAND JURY VENIRE IS NOT SUBJECT TO HARMLESS ERROR ANALYSIS.

The state argues that the indictment by a grand jury that was chosen in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution should be subjected in this matter to the harmless error standard. In Vasquez v. Hillery, 474 U.S. 254 (1986), this Court reviewed its history of finding that the purposeful exclusion of a racial group from service on petit and grand juries and observed that the Court had repeatedly upheld, for over a hundred years, the conclusion that such violation of the Equal Protection Clause required the reversal of the conviction and the dismissal of the indictment. 474 U.S. at 264. The Court observed in Vasquez v. Hillery, 747 U.S. at 260, 261 that:

> In 1880, this Court reversed a state conviction on the ground that the indictment charging the offense had been issued by a grand jury from which blacks had been excluded. We reasoned that deliberate exclusion of blacks "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to the securing to individuals of the race that equal justice which the law aims to secure to all others."

747 U.S. at 260, 261 (citing Strauder v. West Virginia, 100 U.S. at 308). The Court then stated "Thereafter, the Court has repeatedly

rejected all arguments that a conviction may stand despite racial discrimination in the selection of the grand jury." [citations omitted] The Court observed that it had "explicitly addressed the question" of whether they should reconsider this line of cases as late as 1979 in Rose v. Mitchell, 443 U.S. 545. The Court then stated:

> We reaffirmed our conviction that discrimination on the basis of race in the selection of grand jurors "strikes at the fundamental values of our judicial system and our society as a whole," and that the criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposely have been excluded.

474 U.S. at 262 (citing Rose v. Mitchell, 443 U.S. 556). The Court further found that it was improper to use harmless error analysis in these violations because "intentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent." 474 U.S. at 262.

The state's reliance on United States v. Mechanik, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), is simply misplaced. In Mechanik the error before the grand jury that was found to be harmless was that two government witnesses had appeared simultaneously in violation of Rule 6(d) of the Federal Rules of Criminal Procedure. It is beyond question that the violation of a rule of procedure does not raise to the same level for the purpose of harmless error analysis as does violation which effects not only the accused but the race or class which is systematically excluded from jury service, and therefore, effects the society as a whole.

The state also misses the mark with its citation to Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). The Court made very clear that Bank of Nova Scotia involved the use of the supervisory power of the federal courts to circumvent the harmless error rule when only nonconstitutional interests were involved. Id. at 254. The Court specifically addressed the issue raised here when it stated:

> To be distinguished from the cases before us are a class of cases in which indictments are dismissed, without a particular assessment of the prejudicial impact of the errors in each case, because the errors are deemed fundamental. These cases may be explained as isolated exceptions to the harmless-error rule. We think, however, that an alternative and more clear explanation is that these cases are ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice. (citation omitted). These cases are exemplified by Vasquez v. Hillary (citation omitted) where we held that racial discrimination in selection of grand jurors compelled dismissal of the indictment. In addition to involving an error of constitutional magnitude, other remedies were impractical and it could be presumed that a discriminatorily selected grand jury would treat defendants unfairly. (citation omitted).

Id. at 256, 257.

The State of Tennessee has provided no reason for the Court to reconsider this long enduring and carefully considered limited exception to the harmless error rule.[2]

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[2] Before the district court the state had submitted evidence through the District Attorney of Davidson County that evidence was no longer available to retry Jefferson and submitted that as grounds to impose the harmless error rule. However, since the decision of the Sixth Circuit the state has suddenly discovered that the evidence was available all along and Jefferson has now been reindicted.

CONCLUSION

For the reasons set forth above the instant case does not present an issue for review on certiorari and the respondent, James Thomas Jefferson, prays that this Court will deny the petition of the State of Tennessee.

Respectfully submitted,

RAY & HOUSCH

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Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and exact copies of the foregoing have been forwarded by first class mail, postage prepaid, to Charles Burson, Attorney General and Reporter, and Debra K. Inglis, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37243-0485, on this the 19th day of August, 1992.

Donald E. Dawson
Donald E. Dawson

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

NO. 92-193

JACK MORGAN, WARDEN,

Petitioner,

v.

JAMES THOMAS JEFFERSON

Respondent.

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Report and Recommendation of Magistrate 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED

JAN 18 1991

CLERK

JAMES THOMAS JEFFERSON	)	
	)	
Petitioner	)	
	)	
v.	)	No. 3:89-0382
	)	Judge Nixon
JACK MORGAN, Warden	)	
	)	
Respondent	)	

REPORT AND RECOMMENDATION

I. INTRODUCTION

This petition for writ of habeas corpus was referred to the Magistrate by the Honorable John T. Nixon, District Judge, by Order entered July 18, 1989 (Docket Entry No. 2). Pursuant to 28 U.S.C. § 636(b)(1)(B), the Magistrate was directed to consider whether the claims in this action are frivolous or malicious within the meaning of 28 U.S.C. § 1915(d) and to conduct any necessary proceedings under Rule 72(b) of the Federal Rules of Civil Procedure. In essence, "[a] complaint . . . is frivolous where it lacks an arguable basis in law or in fact." Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827, 1833, 104 L.Ed.2d 338 (1989). See also Rule 10, Rules Governing Section 2254 Cases.

The Magistrate found that the petition was not frivolous and directed the respondent to file a response (Docket Entry No. 3). Pending before the Court are the following motions: (1) petitioner's motion to reinstate the Court's earlier Findings of Fact and Conclusions of Law (Docket Entry No. 9); (2) respondent's motion to amend his answer (Docket Entry No. 13); and (3) petitioner's motion to strike the respondent's motion to amend (Docket Entry No. 14).

A-1

This document was entered on the docket in compliance with Rule 58 and/or Rule 79 (a), FRCP, on 1-22-91 By

(17)

Petitioner, James Thomas Jefferson (Jefferson) seeks a writ of habeas corpus alleging violations of the Equal Protection Clause of the Fourteenth Amendment by the systematic exclusion of blacks from the state grand jury and petit jury that initiated and heard the state charges that led to his conviction of first degree murder (Docket Entry No. 1). In his motion, Jefferson moves to reinstate an earlier opinion of this Court that there was systematic exclusion of blacks from his grand juries in violation of the Equal Protection Clause. The Court's opinion was reversed by the Court of Appeals, but only because of Jefferson's failure to exhaust his state remedies (Docket Entry No. 9). Respondent Jack Morgan, Warden of the Tennessee State Penitentiary, does not object to consideration of the prior opinion, but contends that the Court should reconsider subsequent facts since that opinion (Docket Entry No. 10).

Respondent moves to amend his answer to assert that Rose v. Mitchell, 443 U.S. 545, 61 L.Ed.2d 739, 99 S.Ct. 2993 (1979) does not have retroactive effect on this case based upon the rule announced in Teague v. Lane, 489 U.S. ___, 103 L.Ed.2d 334, 109 S.Ct. 1060 (1989) (Docket Entry No. 13). In response, petitioner moves to strike respondent's motion to amend his answer as untimely under Local Rule 8 (Docket Entry No. 14). Respondent contends that Local Rule 8 is inapplicable or, in the alternative, that the Court should grant leave to amend (Docket Entry No. 16).

For the reasons set forth below, the Magistrate recommends that this Court's prior findings and conclusions in Jefferson v. Dutton, 607 F. Supp. 355 (M.D. Tenn. 1985) be reinstated in this case under the "Law of the Case" doctrine that courts will not redetermine issues resolved in earlier litigation absent a manifest injustice. The Court of Appeals in reversing the Court's prior judgment, did so only because petitioner had an unexhausted state claim and did not otherwise

disturb the Court's holding on the facts. Moreover, respondent has failed to demonstrate clear error in the Court's prior judgment. The Magistrate also recommends that respondent's motion to amend his answer be granted, because the arguments contained in the amendments may affect the disposition of this case and because leave to amend will not prejudice the petitioner. The Magistrate also recommends that petitioner's motion to strike be denied because respondent's motion is not bound by the time constraints of Local Rule 8(b)(3) in this habeas corpus proceeding.

II. REVIEW OF THE RECORD

Jefferson is a black citizen who was indicted by the Davidson County Grand Jury on July 23, 1968 for first degree murder. Jefferson v. Dutton, 607 F. Supp. 355, 357 (M.D. Tenn. 1985). The grand jury that indicted Jefferson had two black jurors with the other jurors and the foreperson being white. Id. at 358. The jury for Jefferson's first trial was made up of seven whites and five blacks. Id. at 357 n. 1. That trial ended in a hung jury. Id. at 357. Petitioner's second trial had a jury made up of ten whites and two blacks. Id. at 357 n. 2. This trial ended in petitioner's conviction and sentence of ninety-nine (99) years. Id. at 357. Jefferson appealed to the Tennessee Court of Criminal Appeals, which remanded the case for an evidentiary hearing on the systematic exclusion of blacks from petit and grand juries. Id. The Tennessee Supreme Court affirmed this decision to remand. Id.

Upon remand, the state trial court limited petitioner's proof to the composition of the grand jury that indicted him and the petit jury that convicted him. Id. The trial court concluded that there had been no systematic exclusion of blacks with respect to either jury. Id. In 1977, the Court of Criminal Appeals

affirmed this decision and the Tennessee Supreme Court denied permission to appeal. Id.

Jefferson then filed his petition in this Court. The Magistrate incorporates this Court's prior factual findings on Jefferson's first federal habeas corpus petition about racially discriminatory practices in the selection of grand jurors in Davidson County.

> The parties agree that petitioner has made out a prima facie case of racial discrimination in the selection of grand juries. As to the first element in the three-prong test in Castaneda, blacks are clearly a suspect category for purposes of equal protection analysis. Second, petitioner has satisfied the rule of exclusion. Evidence was presented that in the decade prior to petitioner's indictment (1958-1968), there were thirty-three (33) grand juries. Each grand jury was composed of thirteen members who were selected by criminal court judges in Davidson County. Of those thirty-three, seventeen grand juries had only one black member. Seven grand juries had no blacks, and the number of blacks on eight grand juries was unknown. There were two blacks on petitioner's grand jury. The black population of Davidson County was approximately nineteen percent during the period in question. All twenty-five of the grand juries, for which data is available, had a percentage of blacks that was significantly less than the percentage of the population of blacks in Davidson County. Thus, the Court concludes that petitioner has satisfied the rule of exclusion.
>
> Petitioner has also satisfied the third element of the Castaneda test by showing that the appointing judges under the keyman system were aware of the race of the grand jurors that they appointed. Such a procedure is clearly susceptible to abuse. [citing Rose]
>
> • • •
>
> In the case at bar, three grand juries were selected by the criminal court judges for Davidson County each year during the period from 1958 to 1968 using the keyman system. In 1971, three years after petitioner's indictment, the County changed to a system whereby both grand jurors and petit jurors were selected from computer-generated lists. During the decade in question, most of the jurors were appointed by the Honorable Raymond H. Leathers, who began serving in Division I of the Davidson County Criminal Court in 1958, and the Honorable John L. Draper, who began serving in Division II in October, 1960. These two judges appointed twelve jurors plus one foreman to each grand jury. Documented evidence as to the racial composition of the grand juries is available for all but five of the grand juries and all twenty-six foremen. All twenty-six of the foremen were white, and only fourteen of the 252 jurors were black. Petitioner introduced testimonial evidence as to five additional grand

juries and seven additional foremen. Of the total of thirty-three grand jury foremen, all were white. Of the twenty-six grand juries with a total of 312 non-foreman positions, no more than twenty (6.45%) were black.

The testimonies of Judge Draper and Judge Leathers deny any racial bias in the selection process. The evidence indicates that they depended on first-hand knowledge and referrals from friends and civic groups as the basis for recruiting grand jurors. Both judges used objective guidelines to select jurors; the juror characteristics sought included citizenship activities, maturity, work experience, standing in the community, and general qualities of good citizenship. Of primary concern to the Court, however, is not the criteria used to select actual grand jurors, but the pool from which those jurors were chosen. It is the judgment of the Court that the effect of the process by which the pool of potential jurors was formed was excessively weighted toward the white community and served to exclude potential black grand jurors. This conclusion is buttressed by the fact that all but one of the twenty-six juries had zero or one blacks and by the fact that not one of the thirty-three foremen selected was black. "Statistics are not, of course, the whole answer, but nothing is as emphatic as zero...."

Jefferson v. Dutton, 607 F. Supp. at 358, 359, 360. (emphasis added).

This Court arrived at its conclusions on petitioner's claim under the test set forth by Castaneda v. Partida, 430 U.S. 482, 51 L.Ed.2d 498, 97 S.Ct. 1272 (1977).

...[I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. ... Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time.

•••

This method of proof, sometimes called the "rule of exclusion," has been held to be available as a method of proving discrimination in jury selection against a delineated class. ... Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

•••

> Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

Castaneda, 430 U.S. at 494-95. (emphasis added)

In a word, Castaneda holds that the systematic exclusion of a petitioner's group from a petitioner's grand jury may be shown by a substantial underrepresentation of that group over a significant period of time when the procedure for grand jury selection is open to such abuse.

For its conclusions of law, the Court found as to the first element of Castaneda, that Jefferson's group was clearly a suspect category "for purposes of equal protection analysis. Jefferson, 607 F. Supp. at 358. As to the second element of Castaneda, the Court's review involved evidence as to the composition of Davidson County grand juries from 1958 to 1968. Id. at 358. The state courts had only considered petitioner's grand jury and the percentage of the black population in Davidson County which was eligible for jury duty. See Jefferson v. State of Tennessee, 559 S.W.2d 649, 651 (Tenn. Cr. App.) cert. denied (Tenn. 1977). This Court, however, held that petitioner was entitled to submit proof as to the composition of grand juries for the ten years before his indictment. Jefferson, 607 F. Supp. at 358.

This Court held that the state courts' refusal to allow petitioner to present evidence on the composition of prior grand juries was a denial of the full, fair and adequate hearing required by 28 U.S.C. § 2254(d)(6) and the due process required by 28 U.S.C. § 2254(d)(7). Jefferson, 607 F.Supp. at 358. This holding relied upon Castaneda, which held that a petitioner could prove underrepresentation "by comparing the proportion of the group in the total population to the proportion called to serve ... over a significant period of time." Castaneda, 430 U.S. at 494. (emphasis added). The Court noted that "without

evidence of other grand juries, it would be virtually impossible to prove systematic exclusion. Jefferson, 607 F. Supp. at 358 n. 5.

In an unpublished opinion, the Court of Appeals for the Sixth Circuit remanded the case with instructions to dismiss the petition without prejudice. Jefferson v. Dutton, No. 85-5335 (6th Cir. June 10, 1986) at 6, attached to Docket Entry No. 8 as Addendum 15. The Court of Appeals held that the systematic exclusion of blacks as forepersons to these grand juries was a separate issue that had not been exhausted in the state courts. Id. at 4. Thus, the petition contained both exhausted and unexhausted claims which required its dismissal. Id.

After a remand, Jefferson's petition on this issue in the state court was denied by the Criminal Court for Davidson County, Tennessee, on September 11, 1987. (Docket Entry No. 1 at 4). The Tennessee Court of Criminal Appeals then affirmed the trial court. State v. Jefferson, 769 S.W.2d 875, 877 (Tenn. Cr. App. 1988) perm. to appeal denied (Tenn. 1989). It is significant to note here that in its affirmance, the Tennessee Court of Criminal Appeals took issue with the Supreme Court's findings as to the powers of a Tennessee grand jury foreperson in Rose v. Mitchell, 443 U.S. 545, 61 L.Ed.2d 739, 99 S.Ct. 2993 (1979). In Rose, the Supreme Court found that a foreperson on a Tennessee grand jury must endorse a grand jury indictment, or else the indictment would be "fatally defective." Rose, 443 U.S. at 548 n. 2. Later, citing Rose, the Supreme Court held in Hobby v. United States, 468 U.S. 339, 82 L.Ed.2d 260, 104 S.Ct. 3093 (1984), that a Tennessee grand jury foreperson had "virtual veto power over the indictment process." Hobby, 468 U.S. at 348.

The state courts objected to this conclusion that a grand jury foreperson in Tennessee has "'virtual veto power' over the grand jury as a whole." State v.

Jefferson, 769 S.W.2d 875, 877 (Tenn. Cr. App. 1988) perm. to appeal denied (Tenn. 1989). The state courts and the respondent insist that the foreperson's duties were "substantially ministerial and clerical in nature." Id. Since the grand jury foreperson has no greater power than any other juror, the state courts held, and the respondent argues that the systematic exclusion of black citizens from the position of foreperson does not state a separate equal protection claim. Id. at 878.

As to exclusion of blacks from the grand jury, the state courts found no equal protection claim because there was no statistical disparity between the number of black citizens eligible for jury duty and the number of black jurors on petitioner's grand jury.

> On the contrary, two permanent members of that jury were black, and a black alternate was available. The percentage of blacks to the total population eligible for jury duty was 15.4, not far from the average for the county. There was no substantial underrepresentation of his group on this grand jury. With the alternate considered, at times during that term 23 percent blacks were available for the grand jury. There is no substantial disparity here which would suggest any discriminatory purpose or that blacks had been systematically excluded from Davidson County grand juries.

Id. at 878 (quoting Jefferson v. State, 559 S.W.2d 649, 651-52 (Tenn. Cr. App.) cert. denied (Tenn. 1977). The Tennessee Supreme Court denied permission to appeal. State v. Jefferson, 769 S.W.2d at 875. Petitioner then filed his second petition with this Court on May 10, 1989 (Docket Entry No. 1).

III. CONCLUSIONS OF LAW

The pending motions present two issues before the Court; (1) whether the Court should reinstate its findings of fact on the first petition in its consideration of the second petition and (2) whether the Court should allow respondent to amend his answer as to argue that Rose v. Mitchell has no retroactive effect on the present petition. The Magistrate begins with the first issue.

In essence, petitioner asks this Court to treat its prior findings of fact and conclusions of law on his petition as the "law of the case." The doctrine of the "law of the case" holds that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). The court may reconsider a prior holding, however, "if convinced that it is clearly erroneous and would work a manifest injustice." Id. at 618 n. 8. Although the doctrine does not impose an absolute rule, its use comes from the understanding that "efficient disposition of the case demands that each stage of the litigation build on the last, and not afford an opportunity to reargue every previous ruling." 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[1] (2d ed. 1988) at 118.

Whether a trial court's prior judgment is the "law of the case" after an appeal and remand depends upon the extent of the appeal and the issues actually decided by the appellate court.

> If an appeal is taken from only a part of the judgment, the remaining part is res judicata, and the vacation of the portion appealed from and remand of the case for further proceedings does not revive the trial court jurisdiction of the unappealed portion of the judgment. Thus the more flexible doctrine of the law of the case has no application. If the notice of appeal embraces the entire judgment and the judgment is reversed or vacated and the case remanded generally for further proceedings, such law as is established by the appellate court, explicitly or by necessary inference, must be applied by the district court. In the case in which the mandate of the appellate court does not address a particular issue, the appellate judgment, on this issue, does not establish the law of the case, and on appeal from the judgment rendered after remand, it may be reviewed by the appellate court. It remains, however, that the issue was decided by the district court in an earlier case and was not disapproved by the appellate court. It is, therefore, the law of the case, but within the more flexible branch of the doctrine applicable to successive rulings of trial courts.

Id. at 131 (footnotes omitted). In essence, the trial court may apply the undisturbed portions of a prior judgment that has been appealed unless there is clear and convincing proof of error.

Here, the Court of Appeals reversed this Court's earlier judgment because petitioner had not exhausted his state remedies. Jefferson, No. 85-5335 at 6. In doing so, the Court of Appeals noted that "we do not feel it is necessary at this time to discuss the merits of his claim." Id. at 3 n. 7. Thus, the Court of Appeals left this Court's findings of fact undisturbed. Instead of conducting a renewed inquiry into these matters, this Court is free to reinstate its prior findings of fact.

In light of the length and complexity of this litigation, the interests of efficiency dictate that this Court reinstate its prior factual findings absent a manifest injustice. After petitioner's indictment in 1968, he immediately filed a plea of abatement alleging the systematic exclusion of blacks from Davidson County juries. Jefferson, 607 F.Supp. at 357. His claims in that first petition before the state courts were not finally denied until 1977. Id. Petitioner then filed his petition in the federal courts in 1982. Id. The claims in this petition have been before the courts in one form or another since that 1982 filing. There are no new facts on the selection of grand juries presented. Rather, it is an argument of law that respondent advances.

Given the length of time which has already passed, there should be no unnecessary delay from repetitive fact finding. Absent a showing of clear error in this Court's previous factual inquiry, the results of that evidentiary review should be reinstated. Thus, the Magistrate recommends that the Court reinstate its findings of fact on the composition of Davidson County grand juries.

As to the legal conclusions from these factual findings, respondent objects to the Court's prior legal conclusions. (Docket Entry No. 10 at 2). Respondent argues, in essence, that the Court should adopt the state courts' conclusions that the Supreme Court erred in Rose and Hobby. The Magistrate notes that the prior judgment of this Court was not decided upon Rose or Hobby. In fact, the Court's view of the grand jury foreperson claim was similar to the view of the state courts. See Jefferson, 607 F. Supp. at 357 n. 4. In any event, the powers of a Tennessee grand jury foreperson were not essential to this Court's prior holding. The Court's prior holding was an analysis under Castaneda of the process by which Tennessee selected all grand jurors. The Court found that a system in which judges appointing grand jurors were aware of the jurors' race was "clearly susceptible to abuse." Jefferson, 607 F.Supp. at 358. Although Rose v. Mitchell was cited in support of this proposition, the Supreme Court's conclusions in Rose and Hobby buttress this Court's earlier independent finding.[1]

The Court's determination that racial discrimination had impermissibly tainted petitioner's grand jury was based upon the statistical disparity between the number of black grand jurors in the ten years preceding petitioner's indictment and the black population in Davidson County. Id. at 360. As previously noted, Castaneda requires the consideration of grand jury composition "over a significant period of time," not just the racial composition of the grand jury that indicted Jefferson. 430 U.S. at 494. The absence of black forepersons on the grand juries during that period was only one fact supporting the Court's determination. 607 F. Supp. at 360. More important to that determination, however, was the fact

[1]Of course, this Court has no power to overrule the Supreme Court's conclusion in Rose v. Mitchell, even if it believed that the state courts' view was correct.

that all except one of the grand juries considered had only one or no black members. Id.

The virtual absence of black grand jurors, compared to the black population of Davidson County, presented a statistical disparity which itself was part of the proof of systematic exclusion.

> The idea behind the rule of exclusion is not at all complex. If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process.

Castaneda, 430 U.S. at 494 n. 13. Castaneda remains the relevant analysis for a claim that a suspect class has been systematically excluded from a grand jury. See Ford v. Seabold, 841 F.2d 677 (6th Cir.) reh'g denied en banc (6th Cir.) cert. denied 488 U.S. 928, 102 L.Ed.2d 334, 109 S.Ct. 315 (1988). Respondent has not articulated any other applicable analysis. Therefore, the Magistrate finds no clear error in the Court's prior judgment.[2]

Finally, the Tennessee courts found and the respondent argues that because two blacks were on the grand jury, that there is no violation of the Equal Protection clause. The long-standing federal rule, however, is to the contrary.

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[2]The Court of Appeals for the Sixth Circuit has held that the absence of a suspect class did not establish a prima facie case of discrimination. Ford, 841 F.2d at 681. In so holding, the Court of Appeals relied on Carter v. Greene County, 396 U.S. 320, 24 L.Ed.2d 549, 90 S.Ct. 518 (1970). Ford, 841 F.2d at 686. The Magistrate, however, believes that Ford is distinguishable. The Court in Ford repeatedly emphasized that at issue there was a Sixth Amendment claim to a jury from a fair cross section of the community, whereas, Castaneda involved an equal protection claim of intentional discrimination. Id. at 683 n. 4 and 684 n. 5. Finally, to the extent that Castaneda was cited on three elements that involve the question of intent, the statistical disparity here is far greater than the statistical disparity in Ford. More specifically, unlike the case here, the petitioner in Ford "points to nothing in the selection process which makes it obvious that the underrepresentation was due to the system itself" and women and men were selected for jury panels using a key wheel. Id. at 685. This Court, however, found that an appointing judge's awareness of a juror's race made the system "susceptible to abuse," in accordance with the Castaneda requirement. Jefferson, 607 F. Supp. at 358.

As Judge Learned Hand stated in United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), aff'd, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951):

> • • • • [W]e will assume that any party to a suit, civil or criminal, is entitled to "have the particular panel which tries his case, drawn at random from a list which is not unlawfully weighted, and that he may complain even though he has not shown that the imbalance has prejudiced him. The question therefore becomes whether the grand panel and the petit panel which respectively found the indictment and tried the case were drawn from an unlawful list."

Dennis, 183 F.2d at 216.

The Dennis rule was affirmed by the Supreme Court. As one District Court succinctly stated: "It is not necessary for defendants to show that they are members of an excluded group or that the alleged imbalance actually prejudiced them." United States v. Bryant, 291 F.Supp. 542, 547 (D. Maine 1968) (emphasis added). The Dennis rule continues to be applied by federal courts. United States v. Donohue, 574 F. Supp. 1269, 1278 (D. Md. 1983); United States v. Guzman, 337 F. Supp. 140, 142 (S.D. N.Y. 1972), aff'd. 468 F.2d 1245 (2d Cir. 1972), cert. denied, 410 U.S. 937, 93 S.Ct. 1397, 35 L.Ed.2d 602 (1973); United States v. Cohen, 275 F. Supp. 724, 739 (D. Md. 1967), aff'd on other grounds sub nom United States v. DiTommaso, 405 F.2d 385 (4th Cir. 1978), cert. denied 394 U.S. 934, 89 S.Ct. 1209, 22 L.Ed.2d 465 (1969). The respondent has cited no authorities to the contrary. Absent such authority, there appears no reason to alter the Court's prior conclusions of law on this issue.

The Magistrate next considers whether respondent should be allowed to amend his answer so as to assert that Rose v. Mitchell has no retroactive effect upon this case. If the Court adopts the Magistrate's conclusions that the Court's prior findings considered as a whole focused on the discriminatory racial selection of grand jurors, with the selection of the foreman as only one aspect of that unlawful selection process, then respondent's arguments based on Rose v. Mitchell are unnecessary. Nevertheless, the Court may permit a party to amend its

pleadings "when justice so requires." Fed. R. Civ. P. 15(a). If the Court finds that Rose v. Mitchell was essential to its prior holding and was erroneously decided by the Supreme Court, then petitioner failed to make a prima facie case. If so, then the burden of proof would not have been shifted to respondent to rebut petitioner's claim. In that event, the Court might never have granted the writ. If respondent's arguments might have affected the prior disposition, then they might affect the Court's current consideration. Justice may so require the Court to allow respondent to assert a meritorious defense, so long as there is no prejudice to petitioner.

Although respondent's motion to amend his pleadings comes long after petitioner's initial filing, the Magistrate notes that there is no trial date set or pending motion for summary judgment. Thus, petitioner has time in which to respond to these amendments. Moreover, Rule 15(a), Fed. R. Civ. P., appears to allow the Court to grant respondent's motion to amend at any time. Local Rule 8, cited by petitioner in opposition, only limits the time in which a party may respond to a motion but does not bar a motion to amend an answer. Local Rule 8(b)(3).[3] Therefore, the Magistrate finds that leave to amend should be granted. Finally, the Magistrate recommends that the Court adopt all prior findings of fact and conclusions of law that the respondent does not contest.

IV. RECOMMENDATIONS

The Magistrate recommends that petitioner's motion to reinstate this Court's earlier findings be granted. The Magistrate also recommends that respondent's motion to amend his answer be granted and petitioner's motion to strike be denied. Under Rule 8(b)(3) of the Rules Governing Section 2254 Cases, any party

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[3]The Magistrate notes that petitioner cites no specific language which bars respondent's motion to amend his answer. See Docket Entry No. 15.

has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to this Recommendation, with the District Court. Any party opposing said objections shall have ten (10) days from receipt of any objections filed to this Report in which to file any responses to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), reh'g denied, 474 U.S. 1111 (1986).

Entered this the 18th day of January, 1991.

WILLIAM J. HAYNES, JR.
United States Magistrate